NO. 11650

In the United States Circuit Court of Appeals

For the Ninth Circuit

H. W. FOWLER and U. Z. FOWLER,

Appellants,

vs.

CROWN-ZELLERBACH CORPORATION,

Appellee.

APPELLANTS' BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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STATEMENT OF THE CASE

It will be observed from the complaint that this is an action in the nature of trespass on the case. By their complaint the plaintiffs recite a long catalogue of offenses by the defendant, most of which are in the nature of private nuisance, but some of which would constitute a trespass on the property rights of the plaintiff. They ask for damages against the defendant and reserve right to move the Court for an order allowing warrant to issue directing the abatement of the private nuisances described in plaintiffs' first cause of action and also the abatement of the nuisance described in plaintiffs' second

cause of action. The case was twice tried to a jury, resulting in each instance in a disagreement. At the close of the second trial, the Court entertained and allowed the motion of the defendant interposed before the retirement of the jury for a judgment (pp. 40-41 Transcript of Record). It is stipulated by the parties through their respective attorneys, that the trial judge consistently ruled that no damages could be predicated upon any act of the defendant occurring later than July 9, 1944, because prior to that date plaintiffs had announced that on and after that date their resort would be closed to the public and on and after that date the plaintiff had excluded the *general* public from the premises and had built a fence between their premises and the public highway and had used the premises only as their residence and for the housing and entertainment of special guests whom they were willing to accept and who made special reservations to enter the premises for recreational purposes; whereas the plaintiffs, through their counsel, consistently excepted to such ruling and contended that they should be entitled to damages for any wrongful act of the defendant resulting in injury to their property or property rights referred to in the pleading, either prior to or subsequent to said date, July 9, 1944 (pp. 50-51 Transcript of Record).

Owing to the illness of the Court reporter, it became impossible to obtain a complete transcript of the testimony introduced at the last trial of the case, and so far as the purposes of the appellants are concerned, it seems only necessary to direct attention to an excerpt from the trial proceedings, consisting of an offer of proof

made by the plaintiffs and which is found on pages 73-74 Transcript of Record and a portion of the Court's instructions shown at pages 74 to 77.

The offer of proof contains the following statements:

> "Mr. Hoy: The plaintiffs offer to prove by testimony of State Health Officer that the sewage disposal plant of the defendant was improperly installed in violation of the Oregon Statute with reference to installation of sewage disposal plants and was dangerous, and that it was so installed as to be liable to contaminate the water at the swimming and bath resort of the plaintiffs.
>
> The Court: What date?
>
> Mr. Hoy: I beg pardon?
>
> The Court: What date?
>
> Mr. Hoy: It was installed subsequent to July 9th, 1944, I think. Also that the defendant was warned at the time construction was started that the same was wrong and dangerous—was warned by a licensed plumber. Second, we would prove by expert testimony of actual tests made by the experts personally that the water at plaintiffs' said bathing beach was and is actually contaminated by these sewers, rendering it unfit for use as a bathing resort." (p. 74 Transcript of Record).

From the instructions of the Court, we quote the following found on page 76, Transcript of Record:

> "And because that is the way the last case turned out, that the jury question was limited to events in the year 1944, not later than July 9th, 1944, so your inquiry is limited here now to that period. It seemed to me then, and does now, that these plaintiffs could not claim damages of the defendant on any theory after the time when they decided, for their own reasons, to close their property, and that is why your consideration stops at that date. They didn't have to close their property.

They may have thought they had to but that does not settle it. The question is whether they could claim against somebody else for a period after the time when they, exercising their own right as property owners closed the property. They did close it, and so that closes their claim against the defendant as far as this case is concerned, for any time after that.

"The measure of damages, should you allow any, is what profits they lost during the period in question. I don't see how anybody could claim profits against somebody else if he decided for his own reasons to close his own business."

As set forth at pages 78 and 79 of Transcript of Record appellants claim the Court erred in the following particulars:

(1) In assuming that under the pleadings the only damages to which the plaintiffs would be entitled would be damages by the way of loss of profits to their business as operators of a resort property.

(2) Also, in ruling, in effect, that the plaintiffs by barring the general public from the grounds of their resort on July 9, 1944, and afterwards conducting their business in a limited manner and only on the basis of accepting guests or parties who made special reservations, lost their right to any damages suffered by them to their property or property rights inflicted by the action of the defendant subsequent to said July 9, 1944.

Plaintiffs contended that they were entitled to substantial damages for acts of the defendant subsequent to

July 9, 1944, particularly including the act of the defendant in installing a sewage disposal plant at its logging camp, which was installed in such manner as to create a violation of the Oregon statutes relating to installation of sewage disposal plants, which was dangerous, and which was so installed as to contaminate the waters at the swimming beach and bathing resort of the plaintiffs, and which was installed subsequently to July 9, 1944.

When the Court excluded the offer of the plaintiffs to prove the said improper installation of said sewage disposal plant and to prove by expert testimony relating to actual tests that the water at plaintiffs' said bathing beach was actually contaminated by said sewage disposal plant, rendering it unfit for use as a bathing resort, plaintiffs duly excepted to the said ruling of the Court. (Excerpts from Trial Proceedings, pp. 73-74 Transcript of Record and Stipulation, pp. 50-51, said Transcript.)

It appears from the Transcript of Record that the Court instructed the jury that the matter of damages was limited to events in the year 1944, occurring not later than July 9, 1944, and instructed them that their injury was limited to that period, and instructed the jury that the measure of damage should they see fit to allow any, consisted of the profits plaintiffs lost during the period in question, to-wit, the year 1944 prior to July 9 (p. 76 Transcript of Record).

ARGUMENT ON ASSIGNMENT OF ERROR NUMBERED (1) ABOVE

With reference to appellants' contention that the Court erred in assuming that under the pleadings the only damages to which the plaintiffs would be entitled would be damages by the way of loss of profits to their business as operators of a resort property, we respectfully submit the following comments:

In the first place, I believe it is proper for the Court to keep in mind the fact that due to the fact of the unfortunate collapse of the Court Reporter the appellants are placed at a disadvantage in that they are not in position to show the various alleged injuries inflicted upon them by the defendant. It will be observed from a reading of the complaint that the plaintiffs' alleged many acts of the defendant which, if proved, would constitute a nuisance affecting the comfort and convenience of the plaintiffs. These included the construction of an unsightly, noisy logging camp immediately adjoining the resort property, the installation of a work shop adjacent to the resort property where heavy machinery was operated, including a trip-hammer with action so violent as to vibrate cabins on plaintiffs' property, and the installation, in an unlawful manner, of a sewage disposal plant which emptied directly into the lake and close to the swimming float on plaintiff's property. Unfortunately, by reason of the circumstances above mentioned, the appellants are able only to furnish a record showing their offer to prove damage as a result of the improper installation of said sewage disposal plant. Appellants

were able to obtain sufficient of the Record to show that they made an offer of proof with reference to the installation and effect of said sewage disposal plant.

If, as alleged by the plaintiffs and as they offered to prove such sewage disposal plant was constructed in such manner as to constitute a violation of the Oregon law and contaminate the water at plaintiffs' bathing beach to such extent that it was rendered unsafe and unfit for use, certainly it constituted a nuisance, and the measure of damages to which the plaintiffs would be entitled is to be determined under the rules relating to damages for a public or private nuisance. The Supreme Court of the State of Oregon in the case of *Porges v. Jacobs,* 75 Or. 493, set forth the rule of damages in such case as follows:

> "The true measure of damages is the depreciation in the rental value, *plus compensation for the discomfort and annoyance or injury to health* which plaintiff has suffered by the existence of the nuisance." (Italics are our own).

Certainly since the stipulation of the parties on this appeal discloses that after July 9, 1944, the plaintiffs continued to occupy the property in question "as their residence and for housing and entertainment of special guests whom they were willing to accept and who made special reservations to enter the premises for recreational purposes" (p. 51 Transcript of Record), manifestly the pollution of the water at the bathing resort would constitute a discomfort and annoyance and a very probable injury to health as to the plaintiffs and their guests.

Furthermore, I think it may well be stated at this juncture that the statement of the Court to the effect that the plaintiffs had "closed their property" was an arbitrary conclusion not warranted by the facts as shown by the stipulation of the parties set forth in the Transcript of Record (pp. 50-51). The plaintiffs never closed down their business. As indicated by the stipulation, they conducted the business in a limited manner subsequent to July 9, 1944. If the full Record were before this Court, I think you would find that for a considerable portion of this time the resort was fully occupied by guests who sent in special reservations. To state, as the learned Trial Judge did, not only in his instructions but on numerous other occasions, that the plaintiffs had closed down their business on July 9 was a gross mis-statement of the facts. I assume that this Court will be able to appreciate the fact that a business thus conducted by the plaintiffs in a limited manner might be grievously impaired by the fact that their bathing beach was being rendered unusable and dangerous to health by the wrongful and unlawful action of the defendant. The owner's ardor for work and for soliciting patronage thereby would be dampened, if not destroyed. Also, that such fact and such condition would cause a depreciation in the rental value of plaintiffs' cabins and other facilities, and entitle the plaintiffs to compensation for discomfort and annoyance and injury to health, as mentioned in the decision in the case of *Porges v. Jacobs,* supra, is a necessary and natural result.

As stated by the Supreme Court of the State of

Oregon in the case of *Phipps v. Rogue River Canal Co.*, 80 Or. 180:

> "If property cannot be enjoyed unless the health is endangered thereby, a nuisance exists. It is not necessary, however, in order to constitute a nuisance, that the annoyance should be of such a character as to endanger the health of a person or persons, or of the neighborhood, the act need not be positively unhealthy. It is sufficient if it occasions that which is offensive to the senses, and that in any way renders the enjoyment of life and property uncomfortable, or that it prevents its enjoyment in as full and ample a manner as before, that it invades or violates a vested right and materially interferes with the ordinary comfort of human existence or renders one's dwelling-house unfit for habitation; and if the enjoyment of life and property has been so rendered uncomfortable, it is not indispensable to sustain a right of action that one should, by the annoyance or alleged nuisance, have been driven from his dwelling or habitation."

We now notice that in presenting the foregoing argument on point numbered (1) above, argument has also been made on point numbered (2), which relates to the ruling of the Court to the effect that the plaintiffs, by barring the general public from the grounds of their resort July 9, 1944, lost the right to claim any damages suffered by them subsequent to that date by the action of the defendant committed after said July 9, 1944. We are unable to see why damage or injury to a business conducted in the limited manner in which plaintiffs conducted their business subsequent to July 9, 1944, should not be actionable and subject to the same rules that would have obtained had the plaintiffs continued to leave their business open to the highway and to entry

by anyone desiring to drive in. The very fact that the conduct of the business was such that plaintiffs deemed it necessary to their safety that they should bar the general public (including agents of the defendant) from their property should give some indication of the extent to which the defendant had gone in trespassing upon the rights of the plaintiffs to the peaceful enjoyment of their property. Be that as it may, we respectfully submit that the learned Trial Judge in this case arbitrarily sought to substitute his judgment as to the manner in which plaintiffs should conduct their business for the judgment of the plaintiffs. He arrived at his conclusion in that regard from the statements of interested parties in a court room one hundred miles from plaintiffs' place of business. Plaintiffs decided upon the proper course to pursue in that regard while residing on the premises adjacent to the logging camp of the defendant corporation. They had the right to decide which was the better way and the safer way to operate their business. They decided to operate it in a limited manner. If their business, as they saw fit to conduct it, was injured or if they themselves and their guests were discommoded and annoyed by the wrongful conduct of the defendant, the Trial Judge had no right to absolve the defendant from liability for the natural and necessary results of its wrongful conduct.

It seems to the writer that the position of the appellants on this appeal could not be better stated than to quote into the Record a memorandum which the writer handed to the Trial Judge in an effort to persuade him to change his ruling to the effect that no act of the

defendant subsequent to July 9, 1944, could be taken into consideration by the jury in the assessment of damages. We quote this memoradum in its entirety:

> "This is an action brought by H. W. Fowler and U. Z. Fowler in their individual capacities against the defendant. It is an action on the case as nearly as it can be assimilated to any of the common-law forms of action. It sets forth a long series of alleged wrongs and grievances culminating in the fact that by reason of all these, the plaintiffs have been injured and have been deprived of their property rights. So far as the operation of the machine shop is concerned it is an action for damages for nuisance. So far as the improper installation of the sewage plant at the Crown-Zellerbach camp is concerned, it is likewise an action for nuisance, which may be abated. So far as the allegations with reference to the action of the tugboats is concerned, it is a direct action for damages for destruction of personal property. In other words, all of the long series of alleged wrongs and grievances set forth in the complaint taken together make up the one cause of action, an action for trespass on the case.
>
> "1. An action in the nature of trespass on the case is recognized in Oregon.
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> Cash v. Garrison, 81 Or. 135 (138-9).
> Keller v. Spady, 144 Or. 206 (214-5) (#2).
>
> "2. In 52 Am. Jur., pages 911-912 (Sec. 28 under 'Trespass on the Case') the text writer has this to say:
>
> " '*Adjoining Landowners.* The general principle that the owner of property may make such use thereof as he will is subordinate to another which finds expression in the familiar maxim "sic utere tuo ut alienum non laedas"—no one may make an unreasonable use of his own premises to the material injury of his neighbor's. For an injury sustained by the violation of such duty, trespass on

the case is ordinarily the proper common-law remedy; an action of trespass on the case lies for consequential injuries to land where the acts causing the injuries are committed on the defendant's own land. This result has been reached as to the destruction of or injury to a building on neighboring property caused by a fire or by vibrations of blasts in a tunnel, to an injury caused by seepage from an irrigation ditch, and to the destruction of wood on the plaintiff's land, resulting from a negligent act of the defendent on his own land. However, a landowner who cuts or destroys a tree growing on the boundary line without the consent of the adjoining owner is liable in trespass to the latter for such injury. In regard to the existence of implied grants of the easement of light and air, there is a divergence of opinion. Where such an implied grant is recognized, and there is an obstruction thereof, an action of trespass on the case has been regarded as an available common-law remedy.'

"3. With reference to the contents of the complaint, it is the general principle of pleading that the plaintiff's declaration or complaint should contain a direct and positive averment of all of the ultimate facts establishing his cause of action. This principle is applicable in actions of trespass on the case. A plaintiff under a general allegation of damages may recover *all such damages as are the natural and necessary result of such injuries as are alleged,* and the ordinary form of declarations in an action of trespass on the case simply sets out the acts complained of without averring that the plaintiff has suffered special damage. However, special or consequential damages, i.e., damages which do not necessarily result from the injury complained of and which the law does not imply as a result of that injury, must be particularly specified in the plaintiff's pleading and in an action of trespass on the case the recovery of special damages will not be permitted where they are not alleged in the declaration. 52 Am. Jur. 915 (#36).

"In the case at bar plaintiffs, as individuals, have sued the defendant for damages, and, as stated above, the action is in the nature of the common-law action of trespass on the case. This proceeding is permitted in Oregon. They set forth the acts of the defendant. They, as individuals, are entitled in the first instance to *damages to compensate them for all annoyance and inconvenience* that results to them by reason of any and all of the wrongful acts of the defendant. For instance, after defendant has invaded the rights of the plaintiffs by the installation of a machine shop, whether it was installed on July 9, 1944, or any other date, the plaintiffs are entitled to compensation for all of the annoyance and inconvenience they have suffered as a result thereof; and by the same token, if the defendant has improperly and unlawfully installed a sewage disposal plant that contaminates the water adjacent to plaintiffs' swimming beach so that the plaintiffs are unable to use the same for themselves or for guests (whether paying guests or not) plaintiffs are entitled to recover damages therefor because this constitutes an annoyance and an inconvenience and a detriment to the plaintiffs' property. This is so, notwithstanding that all of the acts of the defendant, according to plaintiffs' complaint, taken together constitute a trespass on the case—an invasion of plaintiffs' rights as owners of the property now known as Lake Tahkenitch Resort."

As stated above, unfortunately by reason of the illness of the Court Reporter, the appellants are able in this case to request reversal for only one unlawful act of the defendant, as they have not sufficient Record to present any other alleged errors of the Court. Only in the matter of the sewage disposal plant of the defendant are we able to present sufficient Record to enable the Appellate Court to pass upon the question of whether

or not the learned Trial Judge committed error at the trial; and I understand that counsel for the defendant intends to maintain that we have not even sufficient Record for that purpose. However, we submit that the Record is sufficient to show that the Court erroneously took from the jury the question of damages to the plaintiffs resulting from discomfort and annoyance and loss of rentals which would certainly accrue from the unlawful manner in which the defendant constructed the sewage disposal plant from its large logging camp adjacent to plaintiffs' property. We believe that the Court should be liberal in the consideration of this matter by very reason of the fact that the plaintiffs can secure no better Record and that this condition exists through no fault of theirs.

Respectfully submitted,

HOY & PRAG,
Attorneys for Appellants.